(3) If a company acts in contravention of this section, the company and every officer of the company who is in default shall be liable to a fine not exceeding two thousand dollars."

Clearly, the plaintiff company did not come within any of the exceptions in section 48 and its action was unlawful. It was however submitted to me that the action was saved by the subsection (4) of section 67 of the Companies Act No. 79 of 1965. Section 67 of the Companies Act, 1965 substantially re-enacted the provisions of sections 47 and 48 of the repealed Ordinance but had a new subsection (4) which was in these terms:—

"(4) Nothing in this section shall operate to prevent the company from recovering the amount of any loan made in contravention of this section or any amount for which it becomes liable on account of any financial assistance given in contravention of the provisons of this section."

There was no such saving clause in the repealed Ordinance. Now the Companies Act, 1965 was brought into force on 15th April, 1966, i.e. before the institution of the action herein but I was of the opinion and I so held that by combined effect of section 3(2)(b) of the Companies Act:—

"(2) Unless the contrary intention appears in this Act —

(a) .....

(b) in particular and without affecting the generality of the foregoing paragraph, such repeal shall not not disturb the continuity of status operation or effect of any Order in Council order rule regulation scale of fees appointment conveyance mortgage deed agreement resolution direction instrument document memorandum articles incorporation nomination affidavit call forfeiture minute assignment register registration transfer list licence certificate security notice compromise arrangement right priority liability duty obligation proceeding matter or thing made done effected given issued passed taken validated entered into executed lodged accrued incurred existing pending or acquired by or under any of such written laws before the commencement of this Act."

and section 13 of the Interpretation and General Clauses Ordinance, 1948 (now section 30 of the Interpretation Act, 1967), the law applicable was that of the Companies Ordinance, 1946.

On the question whether in the absence of any specific defence on the ground of illegality and since by O. 19 r. 20 of the Rules of the Supreme Court a bare denial of *non est factum* did not operate as a denial of the legality of the transaction, I could take cognisance of such illegality, I thought the law, on the authority of *Scott* v. *Brown, Doering, McNab & Co.*,[1] *Gedge & Ors.* v. *Royal Exchange Assurance Corporation* [2] and *R.* v. *Weisz & Anor.*[3] was clear that in some cases the court would itself take notice of the illegality of the contract in which the plaintiff was suing if it appeared on the face of the contract and from the evidence brought before it by either party, although the defendant had not pleaded the illegality. It would suffice to refer to the first-mentioned case of *Scott* v. *Brown, Doering, McNab & Co.*, a case concerning an agreement between the plaintiff and McNab one of the defendants for McNab to use the plaintiff's money to purchase shares in a projected company, in an indicatable conspiracy to induce the public to believe that there was a real market for the shares and that they were at a real premium, whereas in truth and in fact, as the plaintiff and McNab well knew, they were not. On appeal, A. L. Smith L.J. (as he then was) had this to say:—

"In my opinion, the maxim *In pari delicto potior est conditio possidentis* applies, and this court ought not to assist the plaintiff when he seeks to recover the £632. 3s. 5d. back from the defendants. Upon these grounds, and without going further into the case, the appeal must be dismissed, and with costs."

Lindley L.J. (as he then was), with respect, put it more succinctly in these words:—

"*Ex turpi causa non oritur actio.* This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognised legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him. If authority is wanted for this proposition, it will be found in the well-known judgment of Lord Mansfield in *Holman* v. *Johnson*." [4]

For those reasons, I dismissed the plaintiff's claim as one founded on an illegality but in the event of my being held to be wrong, came to the findings of fact on the evidence adduced that there was no loan made by the plaintiff company to the defendant and that the 2,500 shares were issued to the defendant in consideration of valuable services rendered by the defendant to Lim Teik Ho and the plaintiff company. I also awarded costs to the defendant.

Claim dismissed.

Solicitors: *Mahendran & Co.; Yeoh Kian Teik & Co.*

LING HOW DOONG v. THE ATTORNEY-GENERAL, SINGAPORE

[O.C.J. (Winslow J.) September 18, 1968]
[Singapore — Suit No. 275 of 1967]

Constitutional Law — Police Force — Disciplinary action — Public Service Commission — Enhancing of sentence — Revisional jurisdiction — Disciplinary Board — Judicial or quasi-judicial — Supervisory jurisdiction — Constitution of Malaysia, arts. 135(2) and 140(1) — Whether two hearings or one — Conflict between Ordinance and Constitution — Police Force Ordinance, 1958, s. 28(2).

The plaintiff, an inspector attached to the Special Branch, had on June 14, 1965, four charges preferred against him for breaches of discipline under the Police Force Ordinance. The then acting Commissioner of Police, Singapore Component, Royal Malaysian Police, appointed a board to conduct a disciplinary enquiry in accordance with the Police Regulations, 1959. The board found the plaintiff guilty of two out of the four charges (as amended in the course of the proceedings). The commissioner informed the plaintiff that the board had found him guilty of two charges and that he had accepted the board's finding and decided to impose a fine of $50 for the first charge and to reprimand him for the second charge.

The plaintiff being dissatisfied with the decision appealed against it. The Public Service Commission after hearing the appeal, decided that he should be dismissed from the service. The plaintiff then commenced this action claiming declaration and damages.

Counsel for the plaintiff submitted four arguments: (1) the board had no power to amend the charges; (2) the board acted on no or no sufficient evidence or acted contrary to the evidence before it and was therefore wrong in law; (3) the appeal against the commissioner's award should have been preferred to the President according to the Police Force Ordinance and not to the Public Service Commission; and (4) even if the Public Service Commission did have the power to hear the appeal, it had no power to enhance the punishment awarded by the Commissioner of Police.

Held: (1) the board did have power to amend the charges;

(2) even if the board was acting in a judicial or quasi-judicial capacity, the court can only exercise supervisory jurisdiction over the board by ensuring that the proceeding against an officer who has been found guilty on departmental charges has not been conducted in any manner inconsistent with the rules of natural justice, or in violation of statutory rules prescribing the mode of inquiry or that the finding is not, on the face of it, so wholly arbitrary and capricious that no reasonable person could even have reached it; the present case did not warrant such an interference;

(3) although under the Police Force Ordinance, an inspector may appeal to the President, this provision since September 10, 1963 must be read in the light of article 140(1) of the Constitution of Malaysia, which sets up a Public Service Commission. Under an Instrument of Delegation of Powers and Duties of the Public Service Commission, an inspector awarded disciplinary punishment by the Commissioner of Police, Singapore may appeal to the Inspector-General. However, since the separation of Singapore from Malaysia, there is no longer an Inspector-General in Singapore, and as such the appellate authority delegated to the Inspector-General has been reverted to the donor of the former, namely, the Public Service Commission as successors to the Police Service Commission. Even otherwise since under the Constitution, the Public Service Commission is in control of disciplinary proceedings of police officers, the provisions of the Police Force Ordinance must give way to the Constitution whenever there is a conflict between the said provision and the Constitution;

(4) an appellate body is barred from enhancing sentence in the absence of a clear power conferred by the relevant legislation, unless the body is vested with revisional jurisdiction. In the present case, the Police Force Ordinance which is the only relevant legislation gives no such enhancing power to the Public Service Commission, nor is the Public Service Commission exercising any revisional jurisdiction, and as such, the Public Service Commission has no power whatsoever to enhance the sentence as imposed upon by the Commissioner of Police. Even if the commission purported to act in exercise of its original jurisdiction, yet since, the plaintiff had not been given an opportunity of being heard on the proposed punishment of dismissal, the requirements of article 135(2) had not been compiled with.

Cases referred to:—

(1) *Wong Keng Sam & Ors.* v. *Pritam Singh Brar* [1968] 2 M.L.J. 158, F.C.

(2) *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171, C.A.

(3) *State of Andhra Pradesh & Ors.* v. *Rama Rao* A.I.R. 1963 S.C. 1723 at p. 1726/7.

(4) *Silva* v. *Attorney-General* (1958/59), 60 New Law Reports p. 145.

(5) *Mohindar Singh & Anor.* v. *R.* [1950] M.L.J. 97.

(6) *Poonamram* v. *State of Rajasthan* A.I.R. 1960 Raj. 56.

(7) *Khem Chand* v. *Union of India* [1958] S.C.R. 1080; A.I.R. 1958 S.C. 300.

(8) *State of Assam* v. *Bimal* A.I.R. 1963 S.C. 1612.

(9) *Government of the Federation of Malaya* v. *Surinder Singh Kanda* [1961] M.L.J. 121, C.A.

CIVIL SUIT.

J. B. Jeyaretnam for the plaintiff.

Ho Thian Cheh (Senior State Counsel) for the defendant.

Cur. Adv. Vult.

Winslow J.: Four charges in respect of breaches of discipline under section 27 of the Police Force Ordinance were preferred on 14th June, 1965 against the plaintiff, an inspector attached to the Special Branch, and the then acting Commissioner of Police, Singapore Component, Royal Malaysian Police appointed a board to conduct a disciplinary enquiry thereinto in accordance with regulation 8 of the Police Regulations, 1959 which were made under the Police Force Ordinance, 1958 (No. 32 of 1958). No objection was taken to the composition of the Disciplinary Board and the board proceeded to hold the enquiry on 4th August, 1965 and eventually concluded it on 6th September, 1965 with a report that the plaintiff was guilty on two of these charges (as amended in the course of the proceedings) as follows:—

"1. You, Insp. Ling How Doong, are charged that you on the 26th day of March, 1965, at about 5.45 p.m. opposite No. 275 Balestier Road, Singapore, did commit an offence of excess of duty resulting in injury to two persons, namely, Tan Gheen Hoe and Ng Kheng Chuan by unjustifiably ordering Sgt. 703 Bahari bin Haji Mohd. Dom of "Radio" Division, to take into custody the said Tan Gheen Hoe and Ng Kheng Chuan, an offence under section 27(1)(k) of the Police Force Ordinance, No. 32 of 1958 and punishable under section 28(1) of the Police Force Ordinance, No. 32 of 1958.

2. You, Insp. Ling How Doong, are charged that you on the 26th day of March, 1965 did commit an offence of neglect of orders by failing to enter details of all your movements throughout the 24 hours in your personal diary in accordance with Police General Order 205, an offence under section 27(1)(h) of the Police Force Ordinance, No. 32 of 1958, and punishable under section 28(1) of the Police Force Ordinance, No. 32 of 1958."

On 14th September, 1965, the Commissioner of Police informed the plaintiff that the board had found him guilty on these two charges and that he had accepted the said findings and decided to award him punishment as follows:—

First charge — fine of $50

Second charge — reprimand.

It should be observed that, so far as this enquiry is concerned, no complaint is made that the plaintiff had not been given a reasonable opportunity of being heard. He had also been represented by an Assistant Superintendent of Police as "counsel" for his defence. Being dissatisfied with his convictions, he appealed against the same and the consequential punishments imposed. This appeal was finally determined by the Public Service Commission which, after consideration of his appeal, decided that he should be dismissed from the service with effect from 24th February, 1966.

The plaintiff took out a writ on 21st February, 1967 with a claim for a "declaration in respect of his purported dismissal from the Singapore Police Force and for damages arising therefrom." His statement of claim which was also delivered on the same day was amended from time to time until 19th February, 1968, and so was the defence until 20th February, 1968. There were also a few further amendments during the trial.

The hearing commenced before me on 30th October, 1967 and concluded on 16th May, 1968, having been part-heard from time to time. I reserved judgment, among other reasons, to await the Federal Court's decision, in another case affecting a police officer, which I considered might be useful in regard to some of the contentions raised on behalf of the plaintiff, though the issues involved were, by no means, the same. That judgment was delivered on 10th August, 1968 in the case of *Wong Keng Sam & Ors.* v. *Pritam Singh Brar* [1] to which I shall have cause to refer later.

Counsel for the plaintiff, Mr. J. B. Jeyaretnam, opened his case by stating that the court had jurisdiction to make declarations on the validity of proceedings of statutory tribunals. He then submitted that there were four issues for me to consider, *viz.*:—

I That the board had no power to amend the charges;

II That the board acted on no or no sufficient evidence or acted contrary to the evidence before it and was therefore wrong in law;

III That the appeal against the commissioner's award should have been preferred to the President and not to the Public Service Commission; and

IV That, if the Public Service Commission did have power to hear the appeal, it had no power to enhance the punishment awarded by the Commissioner of Police.

With regard to issue I, I am of the opinion that the board did have power to amend charges at the conclusion of the case for the "prosecution". Regulation 8 of the Police Regulations, 1959 empowers the board to hear and record all the evidence for the prosecution in accordance with the procedure laid down in regulation 7. Regulation 7 provides that the charge may be amended or added to at any time before the finding and provides the usual safeguards in the interests of the officer concerned such as are to be found in the Criminal Procedure Code.

I do not, however, subscribe to the view that the reference to "hearing" and "recording" of evidence limits the powers of the board, in any way, and converts it into a mere transcribing machine which has only to keep its ears open during the enquiry. I am satisfied that the board complied with the safeguards provided in regulation 7 and that the plaintiff was afforded an opportunity of pleading anew to the amended charges and was offered every opportunity of recalling prosecution witnesses for cross-examination.

It seems to me therefore futile to hold that the board acted without or in excess of jurisdiction on this ground. Even if I am wrong in this, I am fortified in my conclusion by the judgment of the Federal Court, to which I have referred earlier, which held, *per* Wee Chong Jin C.J., with whom the other members of the court agreed, that although the Public Service (Disciplinary Proceedings) (Procedure) Rules, 1964 have statutory force —

> "it does not follow that any particular rule or sub-rule, if breached or not complied with, will have the effect of giving a legal right to a person aggrieved thereby to redress in a court of law. The law is clear that those of the rules in the 1964 Rules which are made for the purpose of carrying out the object of article 135(2) of the Constitution of Malaysia are mandatory (see *State of U.P.* v. *Babu Ram* A.I.R. 1961 S.C. 751 where five judges of the Supreme Courts of India were unanimously of the view that statutory rules made for the purpose of carrying out the object of article 311 (2) of the Indian Constitution which is similar in effect to our article 135(2) are mandatory). In my opinion any rule or sub-rule in the 1964 Rules which cannot on its true construction, be said to be made for the purpose of carrying out the object of article 135(2) are not mandatory but are merely directory as being purely procedural rules. In my opinion any breach or non-compliance with any such purely procedural rule or sub-rule does not give a person aggrieved thereby a legal right to redress in a court of law."

Similarly, in the present case, there is no doubt that the Police Regulations, 1959 have statutory force. The question, however, arises whether regulation 8 was made for the purpose of carrying out the object of article 135(2) of the Constitution of Malaysia which reads as follows:—

"135. (2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard."

The police force is such a service but no complaint has been made to this court, either in argument or by the pleadings, that there has been any contravention of article 135(2). A point also arises as to whether these regulations which were made prior to Malaysia, whose advent was heralded by the Constitution of Malaysia on 16th September, 1963, can be said to have been made for the purpose of carrying out the object of article 135(2). Obviously they were not. Nor do I think that regulation 8, since it still continues to apply, can be said to carry out its object in any way. I am therefore of the view that, even if the power to amend charges given by regulation 7 has no application to the powers contained in regulation 8 and even if the expression "hearing and recording evidence" must be given its literal meaning, notwithstanding its absurdity or repugnance to commonsense, regulation 8 is purely directory or procedural and not mandatory in the sense that a breach or disregard would give a legal right to redress in a court of law.

With regard to issue II, all I think that I need say is that it assumes that the court should be acting in an appellate capacity and not in exercise of its supervisory jurisdiction in relation to the findings of the board. It is furthermore not entirely free from doubt whether this court has jurisdiction to exercise even supervisory powers, having regard to the fact that the board, although it has some of the attributes of a quasi-judicial body, does not have legal authority to make a binding decision determining questions affecting the rights of subjects. (*R.* v. *Electricity Commissioners* [2]). It is more in the nature of a body which, although it makes a finding, has no authority to impose that finding as a binding decision on persons like the plaintiff. There is nothing to prevent the commissioner from making a different award, both as to guilt and punishment, from that recommended by the board. Assuming, however, that the board and the commissioner, or the commissioner himself, did exercise quasi-judicial powers, over which the court can exercise supervisory control, all that the court can do is to ensure that, where an officer has been found guilty on departmental charges, the proceedings against a delinquent officer have not been conducted in any manner inconsistent with the rules of natural justice, or in violation of statutory rules prescribing the mode of enquiry or that the finding is not, on the face of it, so wholly arbitrary and capricious that no reasonable person could ever have reached it. That this is so is stated as follows by Shah J. in *State of Andhra Pradesh & Ors.* v. *Rama Rao* [3]:—

"There is no warrant for the view expressed by the High Court that in considering whether a public officer is guilty of the misconduct charged against him, the rule followed in criminal trials that an offence is not established unless proved by evidence beyond reasonable doubt to the satisfaction of the court, must be applied, and if that rule be not applied, the High Court in a petition under article 226 of the Constitution is competent to declare the order of the authorities holding a departmental enquiry invalid. The High Court is not constituted in a proceeding under article 226 of the Constitution a court of appeal over the decision of the authorities holding a departmental enquiry against a public servant: it is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under article 226 to review the evidence and to arrive at an independent finding on the evidence. The High Court may undoubtedly interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion, or on similar grounds. But the departmental authorities are, if the enquiry is otherwise properly held the sole judges of facts and if there be some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ under article 226 of the Constitution."

At the conclusion of the prosecution case, the board found that two of the four charges were not substantiated and the plaintiff was not called upon to answer those charges. From the grounds of the board (filed at page 36 *et seq.* of the agreed bundle) it is clear that they addressed their minds to the dangers of acting on insufficient evidence, or a lack of it, when they decided not to call upon the plaintiff to answer those two charges. Whilst I do not propose to review the evidence or to weigh their findings on the remaining two charges, which they did find proved after hearing the defence, it is sufficiently clear that there was some evidence relating to them in respect of which it cannot be said that no reasonable body could ever have reached it.

I have deliberately refrained from embarking on an analysis of the evidence before the board for the simple reason that the law and the facts do not, in my view, necessitate such a course.

The court will accordingly not interfere with the board's and the commissioner's findings on the grounds set out in issue II.

I now turn to issue III as to whether the appeal against the commissioner's award should have been preferred to the President and not to the Public Service Commission. Although section 28(2) of the Police Force Ordinance provides that an inspector may appeal to the President within 30 days from the date of any finding or punishment other than an order that he be dismissed or retired from the force, it seems to me that this provision must be read in the light of article 140(1) of the Constitution of Malaysia which reads as follows:—

"140. (1) There shall be a Police Force Commission whose jurisdiction shall extend to all persons who are members of the police force and which, subject to the provisions of any existing law, shall be responsible for the appointment, confirmation, emplacement on the permanent or pensionable establishment, promotion, transfer and exercise of disciplinary control over members of the police force."

Under an Instrument of Delegation of Powers and Duties of the Police Force Commission (Exhibit D.1), which was effective from 16th September, 1963, the appellate authority in Singapore in respect of an inspector awarded disciplinary punishment by the Commissioner of Police, Singapore shall be the Inspector-General. It was argued that, since Singapore's separation from Malaysia, "Inspector-General" should read "Public Service Commission" because the Public Service Commission in Singapore has taken the place of the former Police Force Commission which was the donor of the original delegation. (See section 6(4)(g) of the Republic of Singapore Independence Act, 1965). In other words, it was argued that because there is no longer an Inspector-General, so far as Singapore is concerned, the delegation to the Inspector-General reverts to the donor of the power, namely, the Public Service Commission as successors to the Police Force Commission. With this argument I agree. In any case, I think that the point is only of academic importance, since it is quite clear that the Public Service Commission is undoubtedly in control of disciplinary proceedings of police officers like the plaintiff and is both the appointing as well as the dismissing authority. The Police Force Ordinance must give way in this respect to the Constitution where a clear case of conflict is shown to prevail. (See article 144(1)).

The last and most important issue that remains is issue IV which challenges the action taken by the Public Service Commission on the ground that even if it did have power to hear the appeal, it had no power to enhance the punishment awarded by the Commissioner of Police. In this connection, it is pertinent at the outset to enquire whether the Public Service Commission, in dismissing the officer, purported to act in its appellate capacity over the award made by the commissioner or whether it purported to act in exercise of its original powers as a dismissing authority.

Counsel for the plaintiff submitted that action had otherwise been taken in this matter in full conformity with the Police Force Ordinance and Police Regulations and that since the Ordinance did not give the appellate authority any power to enhance sentence, such as that given to an appellate court under the Criminal Procedure Code, the Public Service Commission acted in excess of its powers in increasing the award of a fine of $50 and a reprimand awarded by the commissioner to one of dismissal from the service. Counsel also pointed out that, in England, the Police (Appeals) Act, 1927 expressly provides power to increase punishment on an appeal in similar circumstances. Counsel also contended on the authority of *Silva* v. *Attorney-General* [4] that the Public Service Commission was bound to act in accordance with the powers conferred by the Police Force Ordinance. That was, however, a Ceylon case where no provision similar to article 135 of the Constitution existed at the time.

It should be remembered that, when the plaintiff originally appeared before the board in August 1965, he faced charges under section 27 of the Ordinance for which there were a number of alternative punishments ranging from dismissal or retirement to reduction in rank, deferment or stoppage of increment, reprimand or caution and, in lieu of or in addition to punishments other than dismissal or retirement, a fine not exceeding $200. The Commissioner of Police undoubtedly took a lenient view of the infractions attributable to the plaintiff and obviously did not consider that the plaintiff's conduct merited any such severe punishment as dismissal. The question arises whether, on appeal, the Public Service Commission, as an appellate body, had power to enhance the punishment. It is clear that, if the Police Force Ordinance is the only legislation with which one is concerned, then it does not contain any power to enhance the punishment awarded by the commissioner. On the authority of *Mohindar Singh & Anor.* v. *Rex*,[5] a Privy Council decision, an appellate body is barred from enhancing sentence in the absence of a clear power conferred by the relevant legislation. In that case, it was held that no express power was conferred by the Criminal Procedure Code to enhance sentence on appeal. The Criminal Procedure Code was amended as a consequence so as to confer such a power. As I have already said, if the Public Service Commission was bound only by the Police Force Ordinance, it had no such power at all.

Further, as Basu states in Volume 5 of his *Commentary on the Constitution of India (4th Edition)*, at page 105, a disciplinary action may

be impugned by a Government servant on non-constitutional grounds available under the general law that the order is without jurisdiction, being *ultra vires* the statutory rule which it is purported to have been made, e.g., where an appellate authority, not being empowered in that behalf by the Rules relating to appeal, enhances the punishment. Basu cites *Poonamram* v. *State of Rajasthan*,[6] in support of this proposition. Modi J. in that case held that:—

> ". . . these rules as they stood at the relevant time did not give any power to the Inspector-General of Police or for that matter any similar appellate authority to enhance the punishment already awarded to a guilty official by a competent subordinate authority.
>
> We should also like to point out that as a matter of principle an appellate authority in an appeal by an aggrieved party may allow the latter's appeal partly or wholly or may dismiss it but it cannot give him higher punishment, and thereby make his position worse than it would be if he had not appealed unless it has been vested with what we may conveniently call revisional jurisdiction by resort whereto the power to award enhanced punishment to the person in default is vouchsafed to it by law.
>
> Such power the Inspector-General did not have at the time he passed the order which has been impugned in this case. That being so, the conclusion is irresistible that the order passed by the Inspector-General of Police enhancing the punishment awarded to the petitioner by the Deputy Inspector-General of Police in this case was entirely without jurisdiction and cannot be sustained in law."

I have therefore to consider, in the present case, whether the Public Service Commission is vested with revisional jurisdiction by resort to which the power to award enhanced punishment is vouchsafed to it by law.

It was argued by Mr. Ho Thian Cheh, State Counsel for the Attorney-General, that since the Public Service Commission was not only the appellate authority but also the appointing and dismissing authority, it had jurisdiction to enhance punishment in exercise of its original powers under the Constitution. This may well be so but it is open to argument whether an appellate body can, in exercise of its appellate functions, switch its role from that of an appellate authority to that of a dismissing authority acting in exercise of its original powers without giving the officer an opportunity of being heard with regard to the proposed dismissal. If this had been a case of disciplinary action taken outside the four walls of the Ordinance and, if an officer had faced dismissal in the first instance, before a board or committee of enquiry under, for example, the Public Service (Disciplinary Proceedings) (Procedure) Rules, 1964, whose report had been referred to the Public Service Commission, then the Public Service Commission in exercise of its original jurisdiction would have been entitled, as a dismissing authority to dismiss him, assuming that there had been compliance with the requirements of article 135(2).

That is, however, not the case here.

The question for determination is whether the Public Service Commission can be said to have been exercising any revisional jurisdiction conferred on it by the law or by the Constitution since it has no power under the Ordinance to enhance punishment on appeal. In my judgment it cannot, despite Mr. Ho's forceful submission that, even if the plaintiff herein had not appealed against the commissioner's award, the Public Service Commission could nevertheless as dismissing authority have ordered his dismissal. He argued that, by virtue of article 132(2A) of the Constitution, the plaintiff held the office of police inspector during pleasure and that therefore the Public Service Commission had the necessary power to dismiss him. This argument seems to beg the question whether the Public Service Commission had power to enhance the commissioner's award on an appeal. As I have said earlier, had the Commission purported to act in exercise of its original jurisdiction, no complaint could have been made provided that there had been compliance with article 135(2).

This brings me to a consideration of the stages at which a reasonable opportunity of being heard should be accorded under article 135(2), which follows the Indian article 311(2).

According to *Basu, op. cit.*, at page 61, reasonable opportunity should be accorded at two stages:—

(a) once at the enquiry stage against the charges levelled against him; and

(b) again, after he is found guilty and punishment is provisionally proposed — against the punishment so proposed upon the finding.

Undoubtedly, the plaintiff was offered this opportunity at the enquiry stage but, when it was proposed to punish him with dismissal, he was not. As *Basu* further states at the foot of page 61:—

> "In some cases, the view had been taken that in exceptional circumstances, it would not be necessary to give notices at two stages. For example, if there was a single charge and the proposed punishment was a single punishment and the civil servant had the amplest opportunity at the enquiry stage to meet the whole case, a second opportunity may not be necessary. In such cases it was held that a combined notice calling upon the Government servant to show cause against the proposed punishment of dismissal in case the charge was established, was good.
>
> This view no longer holds good in view of the observations of the Supreme Court in *Khem Chand* v. *Union of India*,[7] to the effect that no question of showing cause against the punishment proposed can arise until the charge is established and that until then the competent authority must maintain an open mind with regard to the officer concerned. It is only after the inquiry is over and the competent authority, after apply-

ing his mind to the gravity or otherwise of the charges and the evidence on the record, provisionally proposes to award a punishment, that the Government servant can be called upon to represent why the proposed punishment should not be inflicted. As will be explained hereafter (p. 71) post), the above view has been reiterated in all later cases, up to *State of Assam* v. *Bimal*." (8)

Professor Sheridan, who founded the Law School here about 11 years ago, in an article entitled *A Digest of Dismissal and Reduction in Rank*, published in *Public Law (1962)* at page 285 also refers to these two stages which he calls phases. Referring to the punishment phase he states at page 285:—

"After this inquiry is completed" (meaning the enquiry as to guilt) "the disciplinary authority decides on guilt. If the charges are found proved, the disciplinary authority considers punishment, and if this is tentatively decided to be dismissal, removal or reduction in rank, the delinquent is served with a notice to show cause against the proposed punishment, and there follows what might be termed the inquiry as to punishment. (In Malaya, however, there is no separate inquiry as to punishment, the constitution referring only to an opportunity of being heard.)"

He then adds a footnote as follows:—

"See *Government of the Federation of Malaya* v. *Surinder Singh Kanda*.(9) In the Privy Council, where the decision was reversed, no comment was made on this point: [1962] Malayan L.J. 169."

In *Kanda's* case of course no question arose as to the second phase because the Privy Council reversed the order for his dismissal on another ground and the necessity did not arise to consider whether he should have had an opportunity of being heard with regard to the punishment sought to be imposed. In any case, there was only one punishment for the charge as preferred at the outset.

Mr. Ho has correctly pointed out that no ground has been pleaded which assails the failure of the Public Service Commission to give notice to the plaintiff that his dismissal was contemplated and to give him a reasonable opportunity of making representations against his proposed dismissal.

Had the original charges against the plaintiff only attracted one punishment, namely, dismissal, I would have been reluctant to interfere with the decision of the Public Service Commission despite *Khem Chand's* case. Since, however, the plaintiff originally faced one of a variety of punishments ranging from dismissal to a mere caution, and since the commissioner's award was merely one of a fine of $50 and a reprimand, respectively, on the two charges found proved, a decision on the part of the Public Service Commission, as an appellate body, to dismiss him, coming as it must have done, like a bolt from the blue, and without any warning whatever that the Commission intended to take such a course, in my judgment, detracts from the reasonable opportunity rule which article 135(2) contains, particularly where the Commissioner of Police, far from recommending dismissal as required under section 28 of the Ordinance, in the case of dismissal, has categorically adopted a more lenient course.

It is with some regret that I have to hold, for the reasons which I have already stated, in this particular instance, the Public Service Commission acted in excess of the powers conferred on it by the Police Force Ordinance, on appeal. It also refrained, before dismissing the plaintiff, from informing him beforehand that such a course was contemplated and from giving him a reasonable opportunity of being heard on this aspect of the matter.

As the plaintiff himself said, if he had not appealed against his conviction, he would not have been dismissed because he had, on conviction, been given a nominal punishment of a fine and a reprimand only. Because he brought the matter up, by way of appeal, the drastic course of dismissal was taken without hearing him on this when, if he had not appealed at all, he could only have been dismissed by the Public Service Commission in exercise of its original, and not appellate, jurisdiction.

It follows from my decision with regard to each of the issues stated by counsel for the plaintiff that the declarations asked for in paragraph 16(i)(a), (b) and (c) are refused and the findings of guilt made by the Commissioner of Police will stand in respect of those two charges.

With regard to the declaration asked for in paragraph 16(i)(d), there will be a declaration that the Public Service Commission had no power, acting as an appellate body, to award the enhanced punishment of dismissal under the Police Force Ordinance.

If the Public Service Commission had intended to act in exercise of its original powers as the appointing as well as the dismissing authority, it should, in my view, have given the plaintiff an opportunity of being heard on the proposed punishment of dismissal. He should have been informed that it was proposed to dismiss him and he should have been given a reasonable opportunity of being heard as to the reasons why such a course should not be taken. Then only could it have been said that the requirements of article 135(2) had been complied with.

With regard to paragraph 16(i)(e) therefore I declare that the order of dismissal is null and void. It is unnecessary for me to make the declaration specifically asked for in that paragraph or to assess damages as claimed. These are, because of the declarations I have already

made, eminently matters for the executive and not matters with which, in the exercise of my discretion as to granting declarations, or otherwise, I need be further concerned.

Judgment will be entered accordingly with half his taxed costs to the plaintiff.

Judgment for the plaintiff.

Solicitors: *J. B. Jeyaretnam & Co.*

COMPTROLLER OF INCOME TAX, STATES OF MALAYA v. H.K.V.

[A.C.J. (Ong Hock Sim J.) October 14, 1968]
[Penang — Civil Appeal No. 5 of 1968]

Income Tax — Secondary wives — Incomes of — Whether can be added to taxpayer's income for assessment of tax — Income Tax Ordinance, 1947, s. 47(1) — Income Tax Act, 1967, s. 45(1).

The taxpayer in this case had the incomes of two secondary wives added to his own income for assessment of tax. Upon refusal by the comptroller to amend the tax for the year of assessment in question, he appealed to the Income Tax Board of Review on the ground that "since the introduction of the Income Tax Ordinance, 1947 the income of the secondary wives of a Chinese person have not been included in the income of that person. This has been the practice of the Department of Inland Revenue from year of assessment 1948 up to year of assessment 1965. This is a right practice and a correct interpretation of the law. Therefore it is wrong on the part of the Inland Revenue to depart from this procedure as so-called 'secondary wives' are not the legal wives of a Chinese taxpayer. The laws of Muslim marriages regarding plurality of wives should not be applied to a Chinese taxpayer who is not a Muslim." The board in allowing the appeal held that the incomes of secondary wives did not come within the ambit of section 47(1) of the Ordinance and should not therefore be aggregated with the taxable income of the taxpayer. The board also accepted that this view accorded with the practice of the Inland Revenue Department from 1948 to 1965 and in a sense was supported by the definition of "wife" in section 45(1) of the Income Tax Act, 1967.

The comptroller appealed against this decision on the grounds that the board: (a) erred in law in deciding that the income of the two secondary wives of the respondent did not come within the ambit of section 47(1) of the Ordinance; (b) was wrong in not deciding that a secondary wife was a married woman within the meaning of section 47(1); (c) erred in arriving at its decision on the ground that it was "fortified by the fact that from 1948 to 1965 incomes of Chinese secondary wives have not been aggregated with the income of the husband". The board was wrong to have allowed itself to be influenced by the practice of the Income Tax Department in order to arrive at the correct interpretation of the law; and (d) further erred in resorting to the provisions contained in a subsequent statute that had no relevance for the purpose of the appeal before itself.

Held, dismissing the appeal: section 47(1) of the Ordinance did not require that the incomes of secondary wives be aggregated with that of the taxpayer and the earlier practice of the Inland Revenue Department was the correct one.

Observations on necessity of plain and unambigious language.

Per Curiam: "The uncertainty as to whether secondary wives ought to have their incomes aggregated with the husband's has been manifest in the attitude of the department since the inception of the Income Tax in 1947. A decision in favour of the Inland Revenue could well result in a direct campaign to aggregate incomes of wives over the last 12 years (since the 6 year time bar has been extended) and there will be cases where certain persons are dead and others will have to shoulder the tax. In effect, failure to pay will involve a number of consequences for non compliance, which would contravene article 7(1) of the Constitution that no person shall be punished for an act or omission which was not punishable by law when it was done or made".

Cases referred to:—

(1) *Choo Eng Choon & Ors.* v. *Neo Chan Neo & Ors.* (*Six Widows case*) (1908), 12 S.S.L.R. 120, C.A.

(2) *Cheang Thye Phin & Ors.* v. *Tan Ah Loy* [1920] A.C. 369.

(3) *Er Gek Ching* v. *Ho Ying Seng* [1949] M.L.J. 171.

(4) *Re Lee Gee Chong decd.* [1965] 1 M.L.J. 102.

CIVIL APPEAL.

Ng Mann Sau (Senior Federal Counsel) for the appellant.

C. O. Lim for the respondent.

Cur. Adv. Vult.

Ong Hock Sim J.: The taxpayer in this case had the incomes of two secondary wives added to his own income for assessment of tax. The Comptroller of Income Tax having refused to amend the tax for year of assessment 1966 in respect of notices of assessments dated 7th May, 1966 and 9th April, 1966 the taxpayer appealed to the Board of Review pursuant to section 75(1)(a) of the Income Tax Ordinance 1947 (hereinafter referred to as "the Ordinance") on three grounds two of which contesting the inclusion of the two ladies as the secondary wives of the taxpayer were abandoned in the course of the hearing before the board. The only remaining ground is set out hereunder:—

"1. Since the introduction of the Income Tax Ordinance, 1947 the income of the secondary wives of a Chinese person have not been included in the income of that person. This has been the practice of the Department of Inland Revenue from year of assessment 1948 up to year of assessment 1965. This is a right practice and a correct interpretation of the law. Therefore it is wrong on the part of the revenue to depart from this procedure as so-called 'secondary wives' are not the legal wives of a Chinese taxpayer. The laws of Muslim marriages regardng pluraility of wives should not be applied to a Chinese taxpayer who is not a Muslim."

The board allowed the appeal of the taxpayer, holding that the incomes of secondary wives do not come within the ambit of section 47(1) of the Ordinance and should not therefore be aggregated with the taxable income of the